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No. 88-1013

In The

# Supreme Court of the United States

October Term, 1988

RAYMOND DE LEO and ANNA A. DE LEO,

*Appellants,*

v.

ANTHONY A. NUNES, INC., and SALLY APPLETON,

*Appellees.*

**On Appeal From The Supreme Court Of The State of Rhode Island And Providence Plantations**

## APPELLEE ANTHONY A. NUNES, INC.'S MOTION TO DISMISS

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## QUESTION PRESENTED

Whether the Court should dismiss this appeal because the appeal does not present a substantial federal question, the judgment below rests on adequate non-federal grounds and the federal questions presented were neither timely raised nor expressly passed on?

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## APPELLEE ANTHONY A. NUNES, INC.'S MOTION TO DISMISS

Appellee Anthony A. Nunes, Inc. pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, respectfully requests that this Court dismiss the within Appeal from the Supreme Court of the State of Rhode Island.

## PRELIMINARY STATEMENT

Appellee Anthony A. Nunes, Inc. ("Nunes")[1] pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States respectfully requests that this Court dismiss the appeal of appellants, Raymond DeLeo and Anna A. DeLeo ("DeLeo"),[2] from the decision of the Supreme Court of the State of Rhode Island.

In his Jurisdictional Statement, DeLeo argues that the Supreme Court of Rhode Island violated his due process and first amendment rights when that court enforced its appellate Rule 3(c). When DeLeo appealed to the Rhode Island Supreme Court, he failed to appeal from an earlier judgment which dismissed with prejudice DeLeo's claims that he and the public had an interest in the real estate in question. Because of this failure, the Rhode Island Supreme Court refused to consider DeLeo's public trust doctrine arguments. DeLeo now claims that the Rhode Island Supreme Court violated his due process rights by refusing to consider these arguments and enforcing its appellate rule which requires appellants to specify the judgment or order appealed from.

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1 Pursuant to Supreme Court Appellate Rule 28, Nunes states that it is a subsidiary of The Nunes Company and is the parent corporation of Metacom Equipment & Supply Co.

2 The suit against Anna DeLeo was dismissed at the trial court level. She was not a party to the Rhode Island Supreme Court appeal, nor is she a proper appellant here. "DeLeo" will refer only to Raymond DeLeo throughout this motion to dismiss.

Despite DeLeo's passionate assertions, this is not a case of constitutional magnitude, but merely a state court tort action. The trial court jury, the trial judge and a unanimous Rhode Island Supreme Court found that DeLeo had intentionally and maliciously made numerous false statements (including the filing of two lis pendens) about Nunes' title to certain real estate, and that Nunes had suffered special damages as a result of this conduct. DeLeo's conduct was sufficiently malicious to support an award of punitive damages, also affirmed on appeal.

DeLeo's appeal does not present a substantial federal question, the judgment rests on adequate independent state grounds and the federal questions DeLeo asks this Court to review were not timely raised or expressly passed on. The Court should dismiss the appeal.

## FACTS AND TRAVEL OF THE CASE

In April of 1979, Nunes purchased 2½ acres of waterfront property (the "parcel") along Hope Street in Bristol, Rhode Island at Walker's Cove. The parcel borders Narragansett Bay. A portion of the parcel consists of land filled by Nunes' predecessor in title, Herreshoff Manufacturing Company ("Herreshoff"), in 1933 pursuant to valid authorization and permits from the State Harbor Commission and the United States Secretary of War.

Early in 1980, Nunes decided to divide the parcel into five lots and develop the area for single family homes (the "development"). Nunes informed the Bristol Planning Board of its proposed development. Because the parcel abuts Narragansett Bay, Nunes needed approvals

from the state's Coastal Resource Management Council ("CRMC") and the Army Corps of Engineers (the "Corps") before beginning construction. Nunes applied for the necessary permits to repair sections of the seawall, to build some docks, and to construct a home.

At this point, DeLeo began his crusade to stop Nunes from developing the parcel which sits across the street from DeLeo's home. DeLeo objected to the CRMC and Corps applications and actively sought a revocation and reconsideration of the Planning Board decision. He repeatedly asserted before all of these agencies and the Bristol Town Council that Nunes did not own the entire parcel. DeLeo alleged that he owned a triangular section at the northwest corner of the parcel and that the public owned another undefined section of the parcel comprising the filled area. DeLeo did not assert these claims prior to Nunes' acquisition of the parcel. Two local newspapers, the *Bristol Phoenix* and the *Providence Journal*, widely reported DeLeo's claims and attempts to scuttle the development.

After a number of hearings, the Planning Board again approved the development on June 19, 1980. DeLeo appealed the decision to the Platting Board where he repeated his claims. That board also rejected DeLeo's claims.

DeLeo succeeded in delaying the development by dragging out the CRMC hearings. He also appealed to the Bristol Zoning Board and called for public hearings before the Town Council. He wrote letters or sent copies to people not remotely connected with the permitting process, and took whatever steps he could to stop the

development. Ultimately, every agency rejected DeLeo's spurious claims. CRMC issued its assent to Nunes in April, 1981 and the Corps granted its permit in June, 1981.

On September 11, 1981, Nunes sold a lot to Sally Appleton. A few days later, DeLeo filed suit against Nunes and claimed again that he and the public owned portions of the parcel. DeLeo also filed a notice of lis pendens in the Bristol Land Records asserting these same claims to the parcel. The lis pendens clouded title to the parcel and prevented Nunes from selling any other lots in the development. Later, DeLeo amended his complaint to add Sally Appleton and her husband (the "Appletons") as defendants and filed a second lis pendens against their title. Nunes counterclaimed for DeLeo's slander of Nunes' title to the parcel.

On October 7, 1981, the Appletons applied to CRMC for a permit to construct their home. Undaunted by his earlier failures, DeLeo again objected and asserted his so-called "title interests." DeLeo caused CRMC to hold numerous and lengthy hearings on the Appletons' application. At the same time, Nunes began work necessary to repair the seawall. DeLeo complained to the Corps about that work. The Corps checked the site and dismissed DeLeo's claim as unfounded.

In 1982, Nunes applied to the Corps for a permit to remove a triangular piece of the Appletons' lot and to fill in that area to straighten the lot line and create a uniform lot to prevent erosion. DeLeo objected. As work progressed, DeLeo continuously complained to police and to the Corps regarding allegedly unauthorized work. The

Corps found DeLeo's claims unsubstantiated. DeLeo physically interfered with the work by getting in the way (standing under the shovel of a crane) and voicing his complaints and "ownership" claims to workers at the development.

In late 1982, DeLeo began a letter-writing campaign against the development. He accused everyone and every agency of complicity and failure to perform regulatory functions. He also repeatedly asserted his title claims. DeLeo wrote or sent copies of letters to: 1) CRMC; 2) the Corps; 3) Bristol Town Council; 4) Bristol Zoning Board; 5) Bristol Planning Board; 6) Bristol Economic Development Council; 7) Senator John Chafee; 8) Senator Claiborne Pell; 9) Congressman Fernand St. Germain; 10) Congresswoman Claudine Schneider; 11) David Stockman; 12) Department of the Interior; and 13) Sarah Amaral, Bristol Town Administrator.

DeLeo did not confine his attacks to the development; he went after Nunes as well. In earlier days, Nunes and DeLeo competed as contractors in bid disputes. In his flood of letters attacking the development, DeLeo demeaned Nunes as crafty and brazen. DeLeo accused Nunes of participation in an illegal conspiracy to circumvent the regulations pertaining to the development. Then, after one of the many hearings that DeLeo put Nunes through, DeLeo promised to put Nunes through 50 more battles before the project was completed. In this instance, DeLeo was true to his word.

Despite DeLeo's vigorous attacks, on September 28, 1982, Nunes obtained the approvals necessary to construct the Appleton home. At the same time, Nunes

moved to quash the baseless action filed by DeLeo. Upon motion by Nunes, Superior Court Justice Almeida ruled on October 20, 1982, that DeLeo had no title interest in the parcel and that a grant by the state and federal governments in 1933 extinguished the public rights in the parcel. Judge Almeida declared null and void and vacated the two lis pendens filed against the parcel by DeLeo.

DeLeo did not appeal Judge Almeida's order. No issues remained because Judge Almeida necessarily and explicitly rejected the claims that DeLeo raised in the complaint when he vacated the lis pendens. Accordingly, upon motion by Nunes, Judge Cochran dismissed DeLeo's complaint in December, 1982.[3]

DeLeo ignored the judgment of the Rhode Island Superior Court and continued to assert his title claims and harass Nunes and the Appletons. He appealed the grant of the Appletons' building permit, wrote letter after letter, requested hearing after hearing before the Town Council, and complained to the police and the Corps about the construction. When Nunes removed the triangular piece pursuant to CRMC and Corps approval, DeLeo complained to the police and the assembled press that the "land was his" and he interfered with its removal. This occurred nearly three (3) months after

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[3] In 1982, DeLeo attempted to appeal Judge Cochran's order of dismissal. Judge Cochran dismissed the appeal as premature since DeLeo did not request or receive the certification required pursuant to Rule 54(b) of the Rhode Island Rules of Civil Procedure for appeals of less than all claims.

Judge Almeida ruled that DeLeo had no interest in the parcel.

DeLeo's slanderous and improper activities increased Nunes' costs of development, required Nunes to pay legal fees to obtain removal of the lis pendens, and, most importantly, rendered the development unmarketable.

The trial of Nunes' claims against DeLeo began on October 28, 1985, and lasted two weeks before Judge Gallant. Judge Gallant directed a verdict in favor of DeLeo on Nunes' claims for malicious use of process and abuse of process, and sent the case to the jury on the slander of title claim. The jury returned a verdict in favor of Nunes for $104,114.87 in compensatory damages and $75,000.00 in punitive damages. Thereafter, Judge Gallant denied DeLeo's motion for a new trial on liability, but granted DeLeo's motion for a new trial on damages unless Nunes filed a remittitur for compensatory damages in excess of $89,421.89 and punitive damages in excess of $30,000.00.

On May 19, 1986, DeLeo filed a notice of appeal in which he specifically appealed from the judgment dated May 2, 1986 and the denial of his motion for a new trial. DeLeo did not appeal Judge Cochran's Order dismissing DeLeo's original complaint. The notice of appeal form requires the appellant to identify and list the date of the judgment or order appealed from. DeLeo did not list December 7, 1982, the date of the order of dismissal. He listed May 2, 1986, the date of the order denying his motion for a new trial on the counterclaim. DeLeo identified the judge on the matter appealed from as Mr. Justice Gallant, not Judge Cochran. In the section of the form

entitled " Trial Court Action Appealed," he skipped over the box next to "Dismissal Merits," and checked the box next to "Judgment/Jury." He then made reference in several other sections of the form to the counterclaim, but never to his complaint. Finally, DeLeo ordered the transcript of the trial on the counterclaim; he did not order a transcript of the hearing on the motion to dismiss. In short, DeLeo did not specifically designate – or even vaguely refer to – Judge Cochran's order of dismissal.

Nunes submitted its pre-briefing statement pursuant to Rhode Island Supreme Court Rule 16(h) on April 9, 1987. Among the several issues presented, Nunes squarely raised the issue of whether DeLeo properly perfected his appeal from Judge Almeida's written decision and order of October 27, 1982 and Judge Cochran's order dated December 7, 1982. DeLeo's brief, filed on October 15, 1987, did not address whether the Rhode Island Supreme Court had jurisdiction to review DeLeo's title claims in light of his failure to comply with Rule 3(c), nor did DeLeo suggest that any constitutional infirmity would arise if the court refused to consider DeLeo's title claims. On November 13, 1987, Nunes filed a motion to affirm the trial court's judgment pursuant to Rhode Island Supreme Court Rule 16(g). In that motion, Nunes discussed in detail the basis for its assertion that DeLeo failed to preserve for review his title claims. Among the grounds asserted by Nunes (and ultimately relied on by the Rhode Island Supreme Court) was DeLeo's failure to comply with the procedural requisites of Rhode Island Supreme Court Rule 3(c). Nunes reiterated its jurisdictional arguments in it brief, filed on March 7, 1988. DeLeo's reply brief, submitted on April 29, 1988, did not

raise any of the constitutional claims which DeLeo now asks this Court to consider.

Finally, at oral argument in May, 1988, DeLeo did not assert that DeLeo's due process rights would be infringed if the Rhode Island Supreme Court did not consider DeLeo's title claims because of his failure to comply with Rule 3(c). In fact, DeLeo did not raise the issues presented to this Court until DeLeo filed his petition for reargument on August 29, 1988. DeLeo had three clear opportunities to raise the constitutional issues between April, 1987 when Nunes first raised the Rule 3(c) issue and May, 1988 when the Rhode Island Supreme Court heard oral argument. DeLeo chose not to address the constitutionality of Rule 3(c) until after the Rhode Island Supreme Court had applied the rule in accordance with its customary practice.

For the reasons stated below, this Court should dismiss DeLeo's appeal.

## ARGUMENT

### A. THIS COURT SHOULD DISMISS THIS APPEAL BECAUSE IT DOES NOT RAISE SUBSTANTIAL FEDERAL QUESTIONS AND THE JUDGMENT BELOW RESTS ON ADEQUATE INDEPENDENT STATE GROUNDS.

#### 1. The Rhode Island Supreme Court's consistent application of its appellate Rule 3(c) does not raise a substantial federal question.

Rule 3(c) of the Rhode Island Supreme Court Rules of Appellate Procedure states:

> The notice of appeal shall specify the party or parties taking the appeal and shall designate the judgment, order or decree or part thereof appealed from.

A plain reading of this language and an examination of the Notice of Appeal form tells an appellant that he must take certain steps to perfect an appeal.

Here, DeLeo did not appeal from Judge Cochran's dismissal of his complaint which alleged that both he and the public owned interests in the parcel under the public trust doctrine. Initially, DeLeo suggested that he actually did appeal this dismissal, but now admits that he chose not to appeal for tactical reasons. Whatever the reasons, DeLeo did not appeal Judge Cochran's decision and the Rhode Island Supreme Court did not have appellate jurisdiction over the dismissal of his complaint. As a result, the Rhode Island Supreme Court refused DeLeo's invitation to reverse state law concerning ownership of validly filled tidal land.[4]

DeLeo asserts that he has been ambushed by the Rhode Island Supreme Court's "novel" application of Rule 3. He states that the court's action denied him due process of law. This claim is frivolous. An appellant is not deprived of due process by a state court's consistent application of its procedural rules. *Gasguet v. Lapeyre*, 242 U.S. 367, 369 (1917); *see also Herndon v. Georgia*, 295 U.S. 441 (1935). Moreover, this Court recognizes that where a

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[4] The question of whether DeLeo and/or the public owned a portion of Nunes' parcel is controlled by state law. *Phillips Petroleum Co. v. Mississippi*, 108 S.Ct. 791, 794 (1988) (state law controls issue of whether state may vest title to public trust lands in private parties).

state's highest court consistently applies a state procedural rule to foreclose consideration of an issue on appeal, the state court's decision rests on independent adequate state grounds. *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978); *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977).

The Rhode Island Supreme Court has consistently held that failure to follow Rule 3 divests the court of jurisdiction and gives res judicata effect to the unappealed judgment. *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984); *Smith v. Smith*, 119 R.I. 642, 645 n.1, 382 A.2d 182, 183-84 n.1 (1978); *D'Agostino v. Yellow Cab Co. of Providence*, 104 R.I. 168, 169, 243 A.2d 98, 99 (1968). In *Hood*, the plaintiffs filed a notice of appeal specifying their appeal from the dismissal of their complaint against two defendants on May 20, 1981. The court held that the plaintiffs' failure to specifically designate the trial court's May 22, 1981 dismissal of their complaint against two additional defendants divested the court of appellate jurisdiction and gave the unappealed judgment res judicata effect. The court stated:

> Rule 3 of the Supreme Court Rules provides that an appellant, in order to perfect an appeal to this court, must specify in his notice of appeal what judgment, order, or decree or part thereof is being appealed and he also must specify the date it was entered.

*Hood*, 478 A.2d at 184. This Court recently agreed that compliance with the substantially identical federal appellate rule is a jurisdictional prerequisite. *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405 (1988).

In view of the plain language of Rule 3 and the Rhode Island Supreme Court's consistent application of

the Rule, DeLeo should have known that to preserve his state law public trust doctrine claims as an issue in the case he was required to appeal from Judge Cochran's dismissal of his complaint.[5] The Rhode Island Supreme Court's application of Rule 3 comports with due process. DeLeo's appeal should be dismissed because it does not present a substantial federal question.

**2. DeLeo's first amendment petitioning claims are not substantial and DeLeo's tort liability rests on adequate non-federal grounds.**

DeLeo claims that his false statements slandering Nunes' title are constitutionally protected as petitioning activity. DeLeo is wrong for two reasons.

First, malicious speech uttered in connection with petitioning activity is not protected by the First Amendment. *McDonald v. Smith*, 472 U.S. 479, 484 (1985).[6] The Rhode Island Supreme Court thoroughly reviewed the jury's and trial court's finding that DeLeo's false statements were made with malice and concluded that ample evidence existed to support this finding. *DeLeo v. Anthony A. Nunes, Inc.*, 546 A.2d 1344, 1346-47 (R.I. 1988).

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[5] DeLeo's failure to immediately appeal Judge Almeida's order vacating the lis pendens presents an additional independently adequate state ground for dismissing this appeal. *Zito v. East Side Associates*, 119 R.I. 629, 381 A.2d 1364 (1978).

[6] Moreover, DeLeo failed to request the trial judge to charge the jury on the right to petition. Under state law, this omission barred him from raising the issue on appeal. *Bernhart v. Nine*, 120 R.I. 692, 391 A.2d 75 (1978).

Second, DeLeo's tort liability does not rest solely on his alleged petitioning activity. DeLeo's substantial non-petitioning activity (e.g. DeLeo asserting his title claims to construction workers and police and his letter writing campaign) and his filing of two lis pendens without a colorable claim to the property provide independent bases for liability which have no constitutional dimension. The propriety of filing a lis pendens is a question of state law. Under Rhode Island law, filing a lis pendens without a colorable claim is not privileged. *Id.* at 1348.

This Court should dismiss this appeal because DeLeo's first amendment petitioning claims are not substantial and because DeLeo's tort liability for slander of title rests on independent and adequate state grounds.

## B. THIS COURT SHOULD DISMISS THIS APPEAL BECAUSE DE LEO DID NOT RAISE THE CONSTITUTIONAL ISSUES ASSERTED HERE AT THE EARLIEST OPPORTUNITY.

This Court will not hear issues of constitutional or federal law where they were either not timely raised or expressly passed on below. *Herndon,* 295 U.S. at 443; *Hartford Life Insurance Co. v. Johnson,* 249 U.S. 490, 493 (1919); *Bowe v. Scott,* 233 U.S. 658, 663 (1914). Constitutional issues presented for the first time on a petition to the state's highest court for reargument are not timely raised unless the court's ruling could not have been anticipated. *Herndon,* 295 U.S. at 444. This principle requires this Court to dismiss DeLeo's appeal.[7]

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[7] The Rhode Island Supreme Court did not expressly pass on the constitutional issues raised for the first time in DeLeo's

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Nunes raised the jurisdictional issue created by DeLeo's failure to comply with Rule 3(c) in its pre-briefing statement on April 9, 1987. DeLeo failed to address the alleged constitutional infirmity of Rule 3(c) in his brief, his reply brief or at oral argument. Only after the Rhode Island Supreme Court agreed with Nunes' position did DeLeo decide to raise the constitutional issues in his petition for reargument.

DeLeo claims that this was the earliest possible time to raise the constitutional issues because he could not anticipate that the court would apply Rule 3(c) in the way it did. DeLeo's argument overlooks the fact that he had three opportunities to address the jurisdictional issue raised by Nunes before the decision and ignores the Rhode Island Supreme Court's consistent application of Rule 3(c) to preclude review of issues not properly preserved. *Hood v. Hawkins*, 478 A.2d 181, 1984 (R.I. 1984); *Smith v. Smith*, 119 R.I. 642, 645 n.1, 382 A.2d 182, 183-84 n.1 (1978); *D'Agostino v. Yellow Cab Co. of Providence*, 104 R.I. 168, 169, 243 A.2d 98, 99 (1968). This Court should dismiss DeLeo's appeal because he did not raise his constitutional arguments in a timely manner.

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petition for reargument. This Court has held that it has no jurisdiction to review a state court judgment where the federal issues are not raised until the petition for reargument unless the state's highest court expressly passes on those issues. *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919).

## CONCLUSION

For the reasons stated above, this Court should dismiss DeLeo's appeal.

Respectfully submitted,

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